



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 6015674

Date: FEB. 6, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a marketing analyst under the second-preference immigrant classification as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position. The Director also found that the Petitioner and Beneficiary willfully misrepresented the Beneficiary's qualifying experience on the accompanying certification from the U.S. Department of Labor (DOL).

The Petitioner bears the burden of demonstrating eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE REQUIRED EXPERIENCE

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).¹ In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the minimum requirements of the offered position of marketing analyst as a U.S. master's degree in international business or marketing, or a foreign equivalent degree, and two years' experience in the job offered or two years of "related sales/marketing experience." Also, part H.14 of the certification, "Specific skills and other requirements," states that a candidate must have "1 year experience in international markets." The Beneficiary's educational qualifications for the job are not at issue.

On the labor certification, the Beneficiary attested that, by the petition's priority date, she gained about 29 months of full-time, qualifying experience. She stated her possession of the following related sales/marketing experience:

- About 10 months as an assistant marketing manager at a business support services company in the United States, from December 2015 to October 2016;
- About six months as a marketing assistant at a vending machine proprietor in Venezuela, from February 2014 to August 2014;
- About five months as a marketing and sales consultant at a jewelry distributor and marketer in Venezuela, from April 2013 to September 2013; and
- About eight months as a sampler for a beverage distributor in Venezuela, from February 2009 to October 2009.

To support the Beneficiary's claimed qualifying experience, the Petitioner submitted letters from the Beneficiary's purported former employers. *See* 8 C.F.R. § 204.5(g)(1) (requiring petitioners to provide letters from former employers containing the employers' names, addresses, and titles, and describing the beneficiaries' experience). In a written notice of intent to deny (NOID) the petition, however, the Director noted that, on a prior U.S. student visa application, the Beneficiary stated a different Venezuelan employment history. As of the visa application's filing in August 2014, the application indicates the Beneficiary's unemployment. The application also states her prior employment by a consulting company from July 2012 to May 2013, and by a beverage company from February 2008 to November 2008.

The Beneficiary's stated unemployment as of the visa application's filing in August 2014 agrees with other evidence of record. Both the labor certification and the letter from the vending machine

¹ This petition's priority date is September 26, 2018, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

proprietor state that she stopped working for the proprietor on August 1, 2014. Thus, as of the visa application's filing on August 3, 2014, she would have been unemployed. But the 10 months of Venezuelan employment experience that the Beneficiary listed on the student visa application does not match the 19 months of Venezuelan qualifying experience that she claimed on the certification and that letters from the purported former employers support.

A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In response to the NOID, the Beneficiary attested that she reviewed the letters from her prior employers before completing the labor certification application with counsel's assistance. But she stated she did not similarly consult payroll records or former employers before completing the student visa application on her own. She said that, as a result, the visa application contains inadvertent misstatements regarding her Venezuelan work history. The Beneficiary stated that, rather than serving as a sampler from February 2008 to November 2008 as the visa application states, she worked in that position from February 2009 to October 2009. Also, although she served the beverage company listed on the visa application as a client during the 2009 period, she said the beverage distributor stated on the labor certification employed her. The Beneficiary also stated that her employment by the consulting company ended in April 2013, not May 2013 as the student visa application states. She said that therefore her employment by the jewelry distributor later in 2013, as listed on the certification, did not overlap her tenure with the consulting company.

The Beneficiary's explanation of misstatements on her student visa application is credible. The Petitioner submitted copies of contemporaneous contracts and payroll records supporting the Beneficiary's employment history in Venezuela stated on the certification. The Director did not credit these documents, questioning the authenticity of the Beneficiary's signatures on them. On appeal, however, the Petitioner submits an expert handwriting analysis concluding that the Beneficiary "very probably" signed the documents.

Despite the Beneficiary's explanations and the documentation from her claimed former employers, the record does not establish her possession of at least two years of qualifying experience. The Petitioner has not explained the omissions from the Beneficiary's student visa application of her purported employment with the vending machine proprietor from February 2014 to August 2014 and with the jewelry distributor from April 2013 to September 2013. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record). Also, as the Director's decision notes, USCIS records show that the Beneficiary remained in nonimmigrant student visa status in the United States from April 4, 2014, to June 17, 2014. Thus, contrary to her claim, the vending machine proprietor did not continuously employ her in Venezuela from February 2014 to August 2014.

On appeal, the Beneficiary asserts that the vending machine proprietor granted her a leave of absence to study English in the United States. Contrary to *Ho*, however, the record lacks independent evidence corroborating the proprietor's purported grant of a leave. Also, the record still does not explain the Beneficiary's omissions from the student visa application of her claimed employment by the vending machine proprietor and the jewelry distributor. The omission of her purported tenure with the vending machine proprietor is particularly troubling. As previously indicated, records show that she filed the student visa application only two days after the end of her

claimed employment by the proprietor. The record does not explain why her visa application would have omitted such recent prior employment. The unexplained omissions cast doubt on the documentation from the vending machine proprietor and the jewelry distributor. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the sufficiency and reliability of remaining supporting evidence of record).

For the foregoing reasons, the Petitioner has not demonstrated the Beneficiary's possession of the minimum experience required for the offered position.

III. MISREPRESENTATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). USCIS may invalidate a certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* (citations omitted).

Here, the Director found that the Petitioner and Beneficiary willfully misrepresented her qualifying experience on the accompanying labor certification application. The record in this case, however, does not support the Petitioner's misrepresentation. Part K of the application lists "Alien Work Experience." The Beneficiary - not the Petitioner - attested to the veracity of the information in Part K, and the Petitioner here attested to the best of its knowledge to the accuracy of the Beneficiary's statements. The record does not otherwise indicate the Petitioner's prior knowledge of her work history and responsibility for the accuracy of the Beneficiary's work history on the application.

The record also does not sufficiently indicate that the Beneficiary willfully misrepresented her experience on the labor certification. As previously discussed, the Beneficiary credibly explained inconsistent experience listed on her student visa application. The Petitioner also submitted contemporaneous business documentation corroborating her explanation. The record therefore does not support the Beneficiary's willful misrepresentation of her experience.

IV. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners with less than 100 employees, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of marketing analyst as \$51,418 a year. As previously noted, the petition's priority date is September 26, 2018.

As of the appeal's filing, required evidence of the Petitioner's ability to pay in 2018, the year of the petition's priority date, was not yet available. Thus, contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner did not demonstrate its ability to pay "at the time the priority date is established."

Thus, in any future filings in this matter, the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements for 2018 and, if available, 2019. The Petitioner may also submit additional evidence of its ability to pay the proffered wage, including proof of any wages it paid to the Beneficiary in those years or documentation supporting the factors stated in *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

V. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.